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No. 90-1854

In the Supreme Court of the United States

OCTOBER TERM, 1991

EDWIN L. CRUMLING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in not departing downward from the Sentencing Guidelines range, on the ground that petitioner was the victim of a government "sting" operation.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 3a-4a) is unreported, but the judgment is noted at 928 F.2d 397 (Table).

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1991. A petition for rehearing was denied on March 12, 1991. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on June 3, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted of receiving through the mails sexually explicit material depicting a minor, in violation of 18 U.S.C. 2252(a)(2). He was sentenced to 12 months' imprisonment, to be followed by two years' supervised release. He was also ordered to pay a fine of $2,000. The court of appeals affirmed by judgment order. Pet. App. 3a-4a.

1. In July 1987, petitioner came to the attention of the United States Postal Inspection Service when a warrant-authorized search of a pornographic video outlet in Florida yielded a letter that petitioner had written in October 1986, asking for videotapes that depicted young teenagers engaged in sexual activities. C.A. App. 14-15, 52, 58-59. As a result of that discovery, in August 1987 a postal inspector, purporting to represent a fictitious organization advocating sexual freedom, sent petitioner a questionnaire inquiring about his sexual interests. Three days later, petitioner returned the completed questionnaire, indicating on it a preference for heterosexual teenage sex. C.A. App. 15-16.

Because of petitioner's responses to the questionnaire, the inspector sent him a letter from a fictitious company that claimed to sell child pornography. The bottom of the letter was a coupon that the reader could return for further information. Ten days later, petitioner returned the coupon with a handwritten note in which he expressed his interest in erotic heterosexual material involving teens or pre-teens, as well as material involving girls or women engaged in bestiality. He also wrote that he would like to meet teen or pre-teen girls, if the company had such contacts. Noting that he sought "discretion," petitioner requested that any information be sent to his post office box. C.A. App. 16-18, 58; Pet. 3.

In response to that communication, the inspector sent petitioner a list of child pornography magazines. Ten days later, petitioner ordered three magazines for $55. C.A. App. 18-19; Gov't C.A. Br. 5-6.[1] In response to the order, the inspector sent petitioner a confirmation letter. C.A. App. 19-20. In November 1988, after a controlled delivery of two of the magazines, the inspector interviewed petitioner, who claimed that he opposed child pornography and that he had ordered the magazines in an attempt to gather information on distributors of such material. Although petitioner said that he had planned to turn over any information he obtained to the police, he admitted that he had never contacted them about the matter. C.A. App. 20-22, 25.

2. In his own defense, petitioner reiterated what he had told the postal inspectors, *i.e.*, that he had ordered the magazines because he "had gotten ads for child pornography and was trying to follow up on it and was doing an informal investigation." C.A. App. 49, 55-56, 59. He denied that he had any interest in meeting young girls, claiming that he had simply wanted to "find[] out about contacts who would be involved in perhaps child prostitution," "selling children," and "renting children." C.A. App. 58. He again acknowledged that he had never informed law enforcement authorities about his "investigation." C.A. App. 59-60. He claimed that the motive for the "investigation" was his "concern about the welfare of children" and his belief that "[c]hildren or innocent children are vulnerable." C.A. App. 59.

3. Under Sentencing Guidelines § 2G2.2, petitioner's base offense level was 13. The presentence report assigned him a two-point increase under Guidelines § 2G2.2(b)(1), because the magazines that he had ordered depicted prepubescent minors or mi-

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[1] The magazines are described at C.A. App. 18-19 and Gov't C.A. Br. 5-6.

nors under 12 years old. C.A. App. 120. With an adjusted offense level of 15 and a criminal history category of I, petitioner's sentencing range was 18 to 24 months. C.A. App. 121. The presentence report identified no factors warranting a departure. C.A. App. 125.

Petitioner filed objections to the presentence report. C.A. App. 131-136. In a presentence memorandum, C.A. App. 105-110, and again at sentencing, C.A. App. 170-172, he asked the district court to depart downward. See also C.A. App. 172-173 (petitioner's allocution). The court rejected the request, C.A. App. 173, agreeing with the government that none of the factors cited by petitioner warranted a downward departure, C.A. App. 137-138. The court did, however, grant petitioner's request for a two-point reduction in his offense level for acceptance of responsibility.[2] With the two-point increase for material involving young children, petitioner's adjusted base offense level was 13. From a sentencing range of 12 to 18 months' imprisonment, the court imposed the minimum term.

4. On appeal, petitioner urged a ground for departure that he had not previously raised. While acknowledging that he had not asserted the defense of entrapment at trial, petitioner alleged in conclusory fashion that he would not have committed the crime

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[2] At sentencing, defense counsel stated that petitioner "is here to acknowledge" that his reason for ordering the magazines "was not solely [to] conduct[] some type of an investigation." C.A. App. 171-172. Petitioner, however, made no such acknowledgment. The court awarded petitioner the reduction even though it found that petitioner "cannot come to grips with acceptance of responsibility," C.A. App. 173, and even though the probation office had recommended against the reduction on the ground that petitioner "does not believe he is guilty." C.A. App. 120. The government appealed this ruling, and the court of appeals affirmed by judgment order. 931 F.2d 52 (1991) (Table).

but for "governmental persistence" in soliciting him. Pet. C.A. Br. 28. In his view, a departure was warranted because the "sting" operation was a mitigating factor that the Sentencing Commission had failed to take into account in establishing the Sentencing Guidelines. *Ibid.* The court of appeals affirmed by judgment order, rejecting without discussion all of petitioner's claims, including the one presented in the petition. Pet. App. 3a-4a.

ARGUMENT

Petitioner argues that the court of appeals erred in declining to remand his case to the district court for consideration of the government's sting operation as a basis for downward departure. That claim does not merit review by this Court.

1. Petitioner did not properly preserve his claim, because he did not raise it in the district court. His objections to the presentence report, his sentencing memorandum, and the sentencing hearing itself are devoid of any suggestion that the government's conduct somehow lessened his responsibility for the crime. In fact, petitioner conceded in his petition for rehearing in the Third Circuit, quoted at Pet. 7, and he concedes again in this Court, Pet. 7, that he never raised his entrapment claim in the district court at sentencing. Petitioner's failure to raise that claim in the district court is not surprising, because his defense at trial—which he asserted through his own testimony and which he now dismisses as a "desperate transparenc[y]," Pet. 9—was that he had knowingly ordered the child pornography as part of his own private investigation of distributors of such material. Not until his case was on appeal did petitioner allege that the government's own conduct should serve as a basis for a downward departure. See Pet. C.A. Br. 28.

The courts of appeals have uniformly held that a district court's discretionary refusal to depart down-

ward from the applicable Sentencing Guidelines range is not subject to review on appeal. *United States* v. *Tucker*, 892 F.2d 8, 9-11 (1st Cir. 1989); *United States* v. *Colon*, 884 F.2d 1550, 1552 (2d Cir.), cert. denied, 110 S. Ct. 553 (1989); *United States* v. *Denardi*, 892 F.2d 269, 272 (3d Cir. 1989); *United States* v. *Bayerle*, 898 F.2d 28, 30-31 (4th Cir.), cert. denied, 111 S. Ct. 65 (1990); *United States* v. *Draper*, 888 F.2d 1100, 1105 (6th Cir. 1989); *United States* v. *Franz*, 886 F.2d 973, 976 (7th Cir. 1989); *United States* v. *Ybabez*, 919 F.2d 508, 510 (8th Cir. 1990); *United States* v. *Morales*, 898 F.2d 99, 102-103 (9th Cir. 1990); *United States* v. *Maldonado-Campos*, 920 F.2d 714, 718 (10th Cir. 1990); *United States* v. *Fossett*, 881 F.2d 976, 979-980 (11th Cir. 1989); *United States* v. *Ortez*, 902 F.2d 61, 63-64 (D.C. Cir. 1990). See also *United States* v. *Rojas*, 868 F.2d 1409, 1410 (5th Cir. 1989); *United States* v. *Buenrostro*, 868 F.2d 135, 139 (5th Cir. 1989), cert. denied, 110 S. Ct. 1957 (1990). Accordingly, petitioner's claim that the court should have departed sua sponte based on the government's involvement in his offense is not an issue that is subject to appellate review.

Moreover, petitioner's failure to raise his present claim in the district court is fatal to his claim. In light of petitioner's failure to ask the district court to depart downward on the basis of the government's conduct, the district court's judgment could not be set aside unless the district court was required to depart downward on such a basis. No such claim could be made, however, since no statute or Sentencing Guideline requires the district court to depart downward on this (or any other) basis.

Contrary to petitioner's contention, Pet. 12-13, the district court did not suggest that it would have departed downward from the Guidelines range on the basis of the government's "sting" operation but for the court's belief that it lacked the authority to do so. At sentencing, the court said "I accept the Government's response to [petitioner's] arguments [in favor

of a downward departure]," C.A. App. 173, and the government had concluded in its sentencing memorandum that "the District Court lacks the authority to depart from the guideline range," C.A. App. 138. Petitioner relies on those statements as the basis for his argument that the district court believed that it could not depart downward, but petitioner has misread the two statements. The government's conclusion was offered in response to other arguments made by petitioner, see C.A. App. 105-110, and the district court's statement must be read in light of the specific arguments that petitioner offered. Because petitioner did not argue to the district court that he should receive a downward departure on the ground that he committed the offense as the result of a "sting" operation, the court's comment at sentencing cannot be treated as a legal ruling that a defendant cannot receive a downward departure if he is apprehended as the result of a "sting" operation.

2. Petitioner's reliance, Pet. 7, on *United States* v. *Bierley*, 922 F.2d 1061 (3d Cir. 1990), is misplaced. There, the defendant, who had been convicted of receiving child pornography through the mail during an undercover operation, asked the district court to reduce his base offense level pursuant to Guidelines § 3B1.2 on the theory that, compared to the undercover agent, he played only a minor or minimal role in the offense. The district court held that the adjustment was unavailable as a matter of law because the defendant was the sole "participant" in the offense. The district court also explicitly said that it would have departed downward but for its belief that it lacked the authority to do so. The court of appeals remanded the case for resentencing, reasoning that, while the adjustment under Sentencing Guidelines § 3B1.2 was unavailable, the district court could properly have departed had it determined, by analogy to that section, that the defendant's conduct would have qualified as minor or minimal if the under-

cover postal inspector had qualified as a "participant."

In *Bierley*, unlike in this case, the defendant presented to the district court the asserted basis for a downward departure, and the district court specifically ruled that it would have departed downward if it had possessed the authority to do so. In such a case, the defendant has preserved his claim for review in the court of appeals. By contrast, in this case petitioner did not give the district court the opportunity to consider the nature of the government's conduct as a basis for a downward departure. The Third Circuit's decision in *Bierley* therefore does not assist petitioner.[3]

3. Finally, there is no need to hold the petition in this case pending the Court's decision in *Jacobson* v. *United States*, cert. granted, No. 90-1124 (Apr. 22, 1991). The question presented in *Jacobson* is whether Jacobson was entrapped as a matter of law by the government's efforts to investigate trafficking in child pornography. Given the material differences between the questions presented in the two cases, this Court's decision in the *Jacobson* case will not have any effect on the proper disposition of this one.

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[3] In any event, any allegation of an intra-circuit conflict is for the court of appeals, not this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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